

SPECIAL COUNCIL MEETING

APRIL 2, 2014

The Special Council Meeting of the Council of the County of Kaua'i was called to order by Council Chair Jay Furfaro at the Council Chambers, 4396 Rice Street, Room 201, Lihue, Kaua'i, on Wednesday, April 2, 2014 at 9:47 a.m., after which the following members answered the call of the roll:

Honorable Mason K. Chock, Sr.
Honorable Gary L. Hooser
Honorable Ross Kagawa
Honorable Mel Rapozo
Honorable JoAnn A. Yukimura
Honorable Jay Furfaro

Excused: Honorable Tim Bynum

Chair Furfaro: I would also like to ask if I could get an approval of the agenda, but I would like to make a comment on ES-711 since we had the briefing earlier. I may want to handle this request for the additional money upfront before we go into Executive Session. On that note, can I get an approval of the agenda?

APPROVAL OF AGENDA.

Mr. Chock moved for approval of the agenda as circulated, seconded by Mr. Rapozo, and carried by a vote of 6:0:0:1 (*Mr. Bynum was excused*).

PUBLIC COMMENT.

Pursuant to Council Rule 13(e), members of the public shall be allowed a total of eighteen (18) minutes on a first come, first served basis to speak on any agenda item. Each speaker shall be limited to three (3) minutes at the discretion of the Chair to discuss the agenda item and shall not be allowed additional time to speak during the meeting. This rule is designed to accommodate those who cannot be present throughout the meeting to speak when the agenda items are heard. After the conclusion of the eighteen (18) minutes, other members of the public shall be allowed to speak pursuant to Council Rule 12(e).

Chair Furfaro: Is there anyone in the public who wants to take three (3) minutes now? Seeing no one, let us go to the first item of the day.

COMMUNICATION:

C 2014-77 Communication (03/13/2014) from the County Attorney, requesting authorization to expend funds up to \$45,000 for Special Counsel's continued services provided for the County of Kaua'i in Lynell Tokuda, et al. vs. Chris Calio, et al., Civil No. CV13-00202 DKW-BMK (U.S. District Court), and related matters.

Chair Furfaro: Thank you. On that note, Mauna Kea, may I ask you to come up on this communication here?

There being no objections, the rules were suspended.

MAUNA KEA TRASK, Second Deputy County Attorney: *Aloha* Chair and members of the Council. Mauna Kea Trask, County Attorney's Office.

Chair Furfaro: Mauna Kea, since we had a briefing with Jennifer Winn on this item requesting forty-five thousand dollars (\$45,000), as well as we have had a review from the Police Commission, I would like to take action on the request for the forty-five thousand dollars (\$45,000) before we go into Executive Session since it is not necessary for us to go in Executive Session again. Would you have any problem if we took that action now?

Mr. Trask: No, Chair. It is your prerogative.

Chair Furfaro: Is there any questions for Mauna Kea?

Ms. Yukimura: I just have a procedural question, Chair. I have no problem with voting on the moneys now, but does that mean that we would not go into Executive Session for ES-711?

Chair Furfaro: Yes.

Ms. Yukimura: I think you folks may have been briefed when I was gone, so I do not know if I had the briefing. I will try to get it separately.

Chair Furfaro: Okay.

Mr. Rapozo: Chair, the reason for the deferral from the last posting was the fact that it had to go through the Police Commission and I would like to assume that process was completed.

Mr. Trask: I would have to go and check myself independently. Like Chair said, Jennifer Winn was tracking that case and was the lead counsel on it. In order to answer that question, I would feel more comfortable if I actually affirmatively did that. In speaking with the Chair, my understanding is that it has gone before the Police Commission before, but I would like to double-check.

Chair Furfaro: Okay, we will come back to that at the end of the day.

Mr. Rapozo: That was the whole purpose of the deferral, so I am just assuming that because it is showing up here that it did go through. I am sure we could probably make a phone call.

Mr. Trask: I can go to Boards & Commissions and check. It will not be a problem.

Chair Furfaro: Okay. We will move that item to the end. I just thought that for the purpose of getting us another briefing in Executive

Session, unless there is anything absolutely new to share— the request is for the money.

Mr. Trask: Perhaps what I can do is go check now and I can tell you during one of the recesses what the response was and then you can take action when you see fit.

Chair Furfaro: Okay.

Mr. Rapozo: Or we can take two (2) minutes and call Boards & Commissions.

Chair Furfaro: Okay. Let us take five (5) minutes and see if you can get that answer for us.

There being no objections, the meeting was recessed at 9:51 a.m.

The meeting reconvened at 9:58 a.m., and proceeded as follows:

Chair Furfaro: Thank you, Mauna Kea. Were you able to call Boards & Commissions?

Mr. Trask: Yes, Chair. Thanks to the Council Staff, they showed me an E-mail that was sent earlier by Jennifer Winn confirming that the Police Commission, on or about February 8th, approved related matters to this.

Chair Furfaro: Okay. I am going to give the floor back to Mr. Rapozo. Did you have a follow-up question?

Mr. Rapozo: Yes. It was not March 28th because the E-mail that came over from your office was on March 5th, and that E-mail, although it does not state a date, did say that the Police Commission voted last Friday to provide the Council...

Mr. Trask: I am sorry— that was February 28th.

Mr. Rapozo: You said February? Okay, I heard wrong. Sorry. Okay. It appears that has been completed, so I am okay. Thank you.

Chair Furfaro: You are satisfied?

Mr. Rapozo: I just have one question and I do not know if Mauna Kea is the right person to answer, but I know that this is a Federal case.

Mr. Trask: Yes.

Mr. Rapozo: I am assuming the Defendants in this case... there is only one name listed in the posting and I do not know if it is proper because there have been Defendants added. Does that require a posting with the names of the added Defendants?

Mr. Trask: I am not sure. I can check with the Office of Information Practices (OIP), but I know that when you reference a case generally,

even legal briefings and documents; if there are a lot of Defendants, you just put “et al.” and refer to the case number, which can be referenced in the future.

Mr. Rapozo: Okay. The other question is— I am going to be asking these questions up front because I want it on the record. Because it is a Federal case, and in prior cases we have been informed that in Federal cases, one attorney can represent all of the County Defendants because of some Federal Court rule, but are we going to pursue that rule that we are... I am just looking at it for costs reasons, obviously. I do not want to triple or quadruple the legal expense when we do not have to.

Mr. Trask: In this case, currently, the Office of the County Attorney is representing the County, including all named individuals in their official capacity. Jennifer Winn was the lead. I am now getting caught up to speed in that case and taking her place. The Special Counsel that we have hired represents Mr. Calio in his individual capacity. I believe we have hired the most recent Special Counsel to represent both Mr. Perez and Mr. Barriga in their official capacity. At this time, it does not appear to be any issue with that; however, there may be an issue later as discovery proceeds and we will make you known of that.

Mr. Rapozo: Right. So at this time, the County Attorney’s Office is representing all of the County Defendants in their official capacities in-house?

Mr. Trask: That is correct. I believe that is the County of Kaua’i Police Department (KPD) and the official capacity officers.

Mr. Rapozo: Okay. Thank you, Mr. Chair.

Chair Furfaro: Mr. Kagawa.

Mr. Kagawa: I guess to clarify, if the County is representing Mr. Perez and Mr. Barriga, then why do we need...

Mr. Trask: No, they are being represented in their individual capacity by outside Special Counsel.

Mr. Kagawa: Okay. Only in their capacity as a County employee?

Mr. Trask: Official capacity.

Mr. Kagawa: Okay. One of the things that come up to me are the exorbitant amounts of attorneys’ fees that we have expended and continue to expend. I think sometimes they read the names and they are not sure what the case is about. I do not know if it is okay for you to just give a brief summary of what year this incident happened. Is that general description for the public something that we do not want to do and why Mr. Calio is being accused of wrongdoing? Why are Mr. Perez and Mr. Barriga also being dragged into this?

Mr. Trask: Real briefly...

Mr. Kagawa: Yes, just so that the public knows.

Mr. Trask: This is a matter in public records. It is covered in the complaints and various motions that have been filed with Federal Court. I actually was the Prosecutor on this case at the time when the original case came up. The Plaintiff in this case, Richard E. Louis— he is deceased now. He and his son Kevin Louis were involved in a criminal complaint where they were found to have drugs, drug paraphernalia, and guns in their possession. They were also cutting *koa* trees in Kōke'e late at night. It was a Department of Land and Natural Resources (DLNR) enforcement action. They came up in response and caught them. I believe there were a couple Defendants in that case... I forget the others... some plead. I believe Mr. Louis went to trial. He was found guilty and he failed to show up for his sentencing date, so there was an arrest warrant for him. KPD went to go effectuate the arrest warrant in conjunction with the Hawai'i Fugitive Safety Task Force, which is statewide, and I think Federal Officials were there as well. The Plaintiff barricaded himself within his house, refused to come out, proceeded to assault the officers that were there, and in order to protect himself, Officer Calio had to use force, which resulted in the Plaintiff in this case passing away.

Mr. Kagawa: Thank you. I really appreciate that, Mauna Kea, because a lot of people in the public do not have the documents necessary. I think this one time really does service to those who are really questioning what we are spending it for. I thank you for that.

Mr. Trask: Okay.

Chair Furfaro: Do you have a question?

Mr. Rapozo: It is not a question, but as people watch this they will question why the County is paying for attorneys for officers in their personal capacity because the Police Department is treated differently. When they are sued in their official capacity— that was the whole reason for the deferral because there is a process that they go through the Police Commission and the Police Commission determines whether or not they qualify for representation in their personal capacity based on their actions if it was within the scope or outside of the scope.

Mr. Trask: Correct. The investigation showed that everyone, the County and the individual officers, all acted appropriately under the law and we believe that we should win the case, essentially.

Mr. Rapozo: Right. I just wanted to make that clarification because it would be very difficult in their line of work. They could be sued quite often and having to defend themselves would just not be practical. Thank you, Mr. Chair.

Chair Furfaro: Okay. Going back to the very beginning, these officers can be covered, as long as it is reviewed by the Police Commission, of which we referenced the February 28th date. Now the request for the money is in front of us and I would like to see if we can get ourselves to a vote on this, Jade.

Mr. Kagawa moved to approve C 2014-77, seconded by Mr. Rapozo.

Chair Furfaro: Okay. We have a motion and a second here. I am going to excuse Mauna Kea from the stand. Is there anyone who would like to

give public testimony on this before I call the meeting back to order? Shay, come right up.

SHAYLENE ISERI: Good morning, Council Chair, Council Vice Chair Chock, and members. I was the Prosecutor when this incident occurred and I am happy to see that the County is fully immersed in protecting the officers. The Defendants in this case— unfortunately, one of them was killed during the attempt to get him into custody and arrest him, but the officers, Chris Calio who is a Sergeant now, as well as Captain Sherwin Perez, are excellent officers. They have been a pride to the Department, as well as a pride to the community. As I had stated in my testimony two (2) weeks ago, it is very important for the public to understand what the circumstances and facts surrounding these Special Counsel cases are. I brought up, as Councilmember Kagawa said, that there are a lot of things that are public and a lot of the information can be shared from the complaints from the answers to the complaints. Unfortunately for Federal cases, there is a particular system where you need to pay in order to access the information. For the Hawai'i State Court system, you do not have to because it is free for the public. For the community to see that the Councilmembers are very concerned about the impression to the public and in bringing light to the cases, I think, is really important and I would like to commend Councilmember Kagawa for asking those questions and also Mauna Kea, who was also working at the Prosecutor's Office when I first started at the Prosecutor's Office, in bringing to light to the community these kinds of cases. Clearly, the officers were in serious danger. I actually attended the scene of the defense and it was a very chaotic situation, but these Defendants had (inaudible) terror on their community, as well as innocent people. For the officers to unfortunately go through this kind of trauma and be sued is quite unfortunate. I would like to bring to the attention that on Maui, they just had two (2) officers that were sued in a shooting and the County Corporation had defended the officers and they just won summary judgments, which just happened last week. That was a serious victory for the officers because their careers are actually put on hold. They suffer a lot of circumstances and a lot of consequences, even though they may be innocent because it involves a death in an execution of a warrant. I commend the Council for bringing forth this information to the public and this openness and transparency that Councilmember Kagawa has brought is definitely going to be a welcome to the community. Thank you.

Chair Furfaro:
did you want to speak?

Thank you for your comments, Shay. Glenn,

GLENN MICKENS: Thank you, Jay. For the record, Glenn Mickens. I also want to compliment Ross for bringing this up. The public, a good part of the time, by the agenda, there is not enough information and we do not even know what is going on and why we are being asked to give away forty-five thousand dollars (\$45,000) more. If Ross did not bring this up and Mauna Kea was not good enough to come up here and answer, the public is still kind of in the dark. Maybe there are people who know like Shaylene, who has been involved in it, and Mauna Kea is involved in it, but the public is not so I think you have to have more information. I think they have done a good job like with the Bynum case and Sheilah Miyake case. I think they have a done a better job now of telling us what the money that we are being asked to give is for. Thank you, Ross.

Chair Furfaro:

Ken?

KEN TAYLOR: Chair and members of the Council, my name is Ken Taylor. I also agree that this agenda item is a little short in informing the public as to what exactly the issues are. When you are asking for moneys, I think it is really important to make it very clear for the public to understand why we are looking for forty-five thousand dollars (\$45,000). It sounds like a very unfortunate situation from what we have heard this morning, but again, the announcement on the agenda is very short of really informing the public. I also had a concern from a comment that was made earlier that you all have been briefed on this issue and that somewhat troubles me again because although I know that it is important to be briefed and understand, but it is supposed to happen in either an announced closed session or in a discussion here at the table. I hope that as we move forward in the future, we pay attention to the Sunshine Law. Thank you.

Chair Furfaro: Anymore? As you can see as I call up Mauna Kea, the reference was made to the Executive Session, which was posted accordingly, on February 28th.

There being no objections, the meeting was called back to order, and proceeded as follows:

The motion to approve C 2014-77 was then put, and carried by the following vote:

FOR APPROVAL:	Chock, Hooser, Kagawa, Rapozo, Yukimura,	
	Furfaro	TOTAL – 6,
AGAINST APPROVAL:	None	TOTAL – 0,
EXCUSED & NOT VOTING:	Bynum	TOTAL – 1,
RECUSED & NOT VOTING:	None	TOTAL – 0.

Chair Furfaro: Thank you very much. Can we go to the next item please?

EXECUTIVE SESSION:

ES-703 Pursuant to Hawai'i Revised Statutes (HRS) Sections 92-4, 92-5(a)(4), and Kaua'i County Charter Section 3.07(E), on behalf of the Council, the Office of the County Attorney requests an Executive Session with the Council to provide the Council with a briefing regarding the settlement in Tim Bynum vs. County of Kaua'i, et al., Civil No. CV12-00523 RLP (United States District Court), and related matters. This briefing and consultation involves the consideration of the powers, duties, privileges, immunities and/or liabilities of the Council and the County as they relate to this agenda item.

Chair Furfaro: For the Clerk's Office, I want to make sure that since this is the second appearance here, I will give the opportunity for testimony in three (3) minute increments. If someone wants to go on for another three (3) minutes, I will give it to them. Please set the timer in three (3) minute increments.

JADE K. FOUNTAIN-TANIGAWA, Deputy County Clerk: We have three (3) registered speakers for this item.

Chair Furfaro: Okay. I will take their testimony now.

Ms. Fountain-Tanigawa: The first speaker is Glenn Mickens.

There being no objections, the rules were suspended.

Mr. Mickens: Thank you, Jay. For the record, Glenn Mickens. The biggest problem I have regarding the Bynum settlement in ES-703 is that this County, who Bynum sued, as an employee of the County, he was actually suing himself and should not have been given a settlement of any kind. In fact, I heard that the County did not settle as it was the insurance company that did it and was done by a wrongly worded that gave the Council no say in the settlement, which was never before done like this if I understand correctly. Bynum said up front that he could win this case in a civil court hearing, but decided to call it quits in the middle of the river. By doing this, would it have not been a positive sign for the County or the insurance company to take this case all the way to Court, and very probably win the case and not pay any settlement at all and the taxpayers would not obligated. This whole sorted issue needs further scrutiny and investigation. It is wrong for the taxpayers who keep picking up the outrageous tab for what is going on. Thank you, Jay.

Chair Furfaro: Thank you. Next speaker.

Ms. Fountain-Tanigawa: The next speaker is Joe Rosa, followed by Ken Taylor.

JOE ROSA: Good morning members of the Council. For the record, Joe Rosa. Again, this is something that should not have ever got started. Any public official, including the President of the United States—ignorance to the law is not excused. On top of that, he has his attorney... I am pretty sure in his capacity... in the public you have an attorney or lawyer. What started supposed to have been stopped before it ever got started. Yet, he was represented by Counsel from the County probably. The details of the thing involved was just took upon personally to the effect that I have heard so many things, such as words that “shall” and “may be” come about. I worked with specifications and I had to do interpretations. If I had any doubt of anything, I would see somebody that could clarify. A lot of these things should not have ever been started. Like I say, any person that is in public office or whatever should not think that they are above the law. This, I feel, was a case that came about in that manner. It should not have ever got started, like I said. It was nearly election time and then a “(inaudible) tactics” thing came about. That is why this all came about. Maybe like it was mentioned before if he had a settlement with the County if he was not going to be in pursue of the case that is now going on. If it was stopped and somebody took the “bull by the horns” and say “the buck stops here,” this would not have gone this far, so you would have to get the proper authorities that can come up and help the County in their problems as far as laws being civil or criminal law. In turn, I think that this should end where it is and Ms. Carvalho (inaudible) because it involved personalities and nothing with just cause. Personalities do not hold up in law. I think that the matter should have stopped before it ever got started because I am pretty sure that no one is above the law. That includes our President of the United States; he was impeached. I thank you.

Chair Furfaro: Thank you, Joe.

Ms. Fountain-Tanigawa: The next speaker is Ken Taylor.

Mr. Taylor: Chair and members of the Council, my name is Ken Taylor. When a Councilmember who is elected makes a strong, negative allegation against another public official who is elected and both are serving at the same time, the people deserve to know the truth, especially because the people are paying for this litigation debt. Would it not have been a positive sign for our County insurance company to take the case all the way to Court and very probably win the case and not pay any settlement at all? I think it is sneaky that one day before the Motion to Dismiss was going to be heard, the insurance company settles the case. That same day, I sat here and heard JoAnn, Gary, and Ross even say that the Motion to Dismiss should be heard before any settlement. I have asked a number of times to see the settlement agreement because I believe it is public information, yet Shay said that even she has not seen the completed signed settlement document and does not know what the exact terms are because it was never finalized. How can this be? It is over one (1) month since the motion to dismiss was withdrawn and no sign of the agreement. Did Bynum get the one million six hundred fifty thousand dollars (\$1,650,000) that he was requesting? Why then was the motion to dismiss withdrawn? It sounds suspicious. Another problem that I have is that it seems like this was a preconceived plan all along. It seems as though Bynum was using his inside knowledge as Councilmember learning about insurance deductibles and settling all of these small frivolous lawsuits in Executive Session with Al Castillo, and then seeing Al hire not one (1), but five (5) attorneys and using it as ammunition to set Bynum up for a big payoff for his vote on the Transient Vacation Rentals (TVR) Bill. Surprisingly, Bynum claimed that this tape recording was hidden from him, but the truth is that the tape was given to the Federal Bureau of Investigation (FBI) as soon as the FBI was available to meet. Written documents confirm this. Did not even Bynum's attorney confirmed that he was the big one in the March demand letter. Read the demand letter. Read the E-mails. Why is Bynum's attorney not willing to discuss the case unless the insurance company is present? If it is clear to me, it must be even clear to you because you are more privy to the information that we get and this was a scam from the beginning. We rely on you all to speak for the people, ask the hard questions, and provide us answers as to what went on.

Chair Furfaro:

Ken, that was your three (3) minutes.

Mr. Taylor: I just have a couple of sentences. The more I look at the history of this case, the same thought that was stated by Councilmember Kagawa keeps running through my mind, "If it smells like a rat, it is a rat." This whole cruddy, grubby, mucky, nasty, unclean, greasy, and shameful issue... and I will repeat that...

Chair Furfaro: I am giving you an extended amount of time. You do not need to repeat your testimony.

Mr. Taylor: Okay. This issue needs further scrutiny and investigation as it is ethically and financially wrong for the taxpayers to keep picking up outrageous tabs for what is going on. Thank you.

Chair Furfaro:

Is there anymore testimony?

Ms. Fountain-Tanigawa: signed up.

No other members from the public have

Chair Furfaro: Okay. Shay, you can use your first three (3) minutes and your additional three (3) minutes, but I have extended you once before as an extra courtesy and I will not extend you anymore time today.

Mr. Kagawa: Chair, before she starts, I have a procedural question.

Chair Furfaro: Yes.

Mr. Kagawa: This is the first item of two? The next one is ES-709? Do the speakers have another opportunity at that time?

Chair Furfaro: Yes, for each agenda item they do.

Mr. Kagawa: I was thinking that we may have taken both at the same time. It is the same matter, right?

Chair Furfaro: No, it is not the same matter.

Mr. Kagawa: Okay. Thank you.

Chair Furfaro: Shay, we will start your time now.

Ms. Iseri: Thank you. What I wanted to bring to light to the County Council are the actions of the County Attorney involved in this matter and it still my position that the County Attorney, Al Castillo, violated his fiduciary duty to the County and our people by acting against the County's best interest. All attorneys are governed by the Hawai'i Rules of Professional Conduct. These rules became effective on January 1, 2014. In the preamble, it explains a lawyer's responsibility. A lawyer as a member of the legal profession has to provide that quality of justice that is demanded. It also, as representative of clients, a lawyer performs various functions. As an advisor, the lawyer provides the client with an informed understanding of the client's legal rights, and in this instance, the client is the County; an obligation and explain their practical implications. A lawyer also zealously asserts the client's position and as we have seen, this did not occur. As negotiator, a lawyer seeks the result advantageous to the client, which is the County, but consistent with requirements of honest dealings with others. In its scope, the Rules of Professional Conduct— they explain the difference between "may" and "shall." Most of these rules are in the imperative as it indicates. There is a difference, unlike what our County Attorney said, between "shall" and "may." "Shall" (inaudible) proper conduct for professional discipline. There are others in the Rules of Professional Conduct that refer to "may" or "should," which are simply permissive and are up to the discretion of the attorney in exercising professional judgment. Rule 1.1 and 1.3 deals generally with competence and diligence of the attorneys, "A lawyer shall provide competent representation. A lawyer shall also be diligent," meaning acting with promptness in representing a client and providing all of the information ongoing in the case." Under Rule 1.4, it specifically deals with communications of the attorney. Again, it is in the mandatory language of a lawyer "shall." "A lawyer shall promptly inform the client of any decision or circumstances. It shall reasonably consult with the client. It shall keep the client informed about the status of the matter. It shall promptly comply with reasonable request for information. It shall consult with the client about any relevant limitation. It shall also promptly inform the client," which is the County, "of a written offer of settlement in a civil controversy and it shall explain the matter to the extent

reasonably necessary to permit the client to make informed decisions regarding the representation of the County.” Clearly, in all of these actions, he failed to follow these Rules of Professional Conduct and they were irrational actions. He failed to communicate, made statements against his own client, failed to answer the complaint timely, subjected the County to potential default judgment, failed to allow cost of travel to assist with preparation of the case, failed to save attorneys’ fees, failed to allow the Special Counsel independence to contest the insurer and determine strategy in the case, failed to protect the County by allowing continuances adverse to the County’s interest...

Chair Furfaro:

That is three (3) minutes.

Ms. Iseri:

He failed to inform the Council of its rights lost in the insurance contract and he failed to protect the County’s interest by giving the insurer total decision-making power without meeting the threshold of five hundred thousand dollars (\$500,000) deductible. There were additional failures by this County Attorney. He failed to promptly notify the County that the insurer was engaged in decision-making. The Council was informed of a decision to settle until February 7th at the Special Council Meeting. This was two (2) week’s presentation, but it has been almost two (2) months now. I still have not, and I assumed the Council still has not received any settlement documents after numerous requests, despite Mr. Bynum going to the media to announce the settlement. This is really “a disaster for the County” as described by another Councilmember. It is a travesty of justice for all. Failures had occurred in the past and failures continue to occur. We are still unclear about all of the circumstances. I had inquired about the decision-making and about the insurance contracts with the Chair as well as other members of the Council and I am informed that they are also in the dark as to what happened. There have been numerous continuances in this matter because of attorneys not being prepared or not being available. We have spent millions, it appears in the end, and not only in societal costs and immediate costs, but perhaps even in insurance costs that will go up as a result of this settlement. It is not enough that I feel that the County has been financially ripped off, but that the integrity of the public government has toppled. I would encourage this Council to open up an investigation into the conduct of the County Attorney and the actions, especially as we have seen that it is not only the representation of clients, but also the financial mechanisms that are used in order to pay these high-priced attorneys. I think this is important, and I would again, ask this County to take a proactive role in stopping the bleeding of the amount of millions of dollars that this County Attorney has wasted at the expense of taxpayers. Thank you.

Chair Furfaro:

Thank you.

Ms. Yukimura:

Chair, I have a question.

Chair Furfaro: Can we put the lights on first?
Councilmember Yukimura, you have the floor.

Ms. Yukimura:
available to us please?

Thank you. Can you make that PowerPoint

Ms. Iseri:

Sure.

Ms. Yukimura:

Thank you.

Ms. Iseri: Councilmember Yukimura, I have a copy so I will provide that to your Staff.

Ms. Yukimura: Okay. Thank you.

Chair Furfaro: Thank you, Shay. On this item, are there any other speakers? Is there any written testimony?

Ms. Fountain-Tanigawa: We have one.

Chair Furfaro: Okay.

Ms. Fountain-Tanigawa: We have one piece of written testimony from Lani Kawahara.

Chair Furfaro: Okay. Councilmember Yukimura.

Ms. Yukimura: Chair, in the interest of transparency and to inform the public, I think it would be helpful to the public's understanding of the case if we could have Ms. Kawahara's testimony read by the Clerk. It mainly consists of Judge's rulings. I just want to say that "Carvalho" in the testimony is referring to Ms. Iseri and "Plaintiff" is Mr. Bynum.

Chair Furfaro: Okay. The request has been made. Mr. Kagawa.

Mr. Kagawa: I do not want to start a practice of reading testimony that comes through our E-mail and what have you. If we went through that consistent practice, I think our Council Meetings would never end on some important issues. Again, are we being fair and just reading one person's testimony or reading everybody's testimony? I think that precedent needs to be set. Thank you.

Chair Furfaro: Councilmember Yukimura.

Ms. Yukimura: I agree that it would be unwieldy to read every testimony, but I think in this case, it is actually very important to have this read out loud in terms of balance. It is mainly a Court ruling.

Chair Furfaro: Okay. Is there any further comments?

Mr. Hooser: I also would support having the Clerk read the testimony into the record. We spent a lot of time for a lot of things here and each of us go on and on sometimes and I think it is important that this be read into the record. Thank you.

Chair Furfaro: I do want to point out to the group that I have been more than fair over the three (3) postings of this item. I have allowed up to six (6) minutes several times on the same items. I have a request from two (2) Councilmembers that I think I will honor. On that note, it seems mostly that this is actually related to the Judge's ruling, so I am going to go ahead and allow that. I do not want anybody but the Clerk to read it into the record.

Mr. Rapozo: Mr. Chair?

Chair Furfaro:

Yes.

Mr. Rapozo: I do want to preface because I have read the order. I do want to state, so that the community is well aware, that this order was done prior to the motion to dismiss and prior to the facts of the matter being brought up to the Judge. This was based on the Plaintiff's motion to dismiss. I just want the public to be aware of that because what this does not include are the arguments, I believe, that would have made us victorious in the case had we gone to the motion to dismiss, which was cancelled one (1) working day before the hearing date. I just want to make sure that the people understand that the Judge worked with information that was not provided in a motion to dismiss.

Chair Furfaro: Your point is well-taken. Any further comments before I ask the Clerk to read this testimony? I am sorry— do you have a question? The three (3) minute rule will work. If you come up, I will answer you. Your question was, "Will the three (3) minute rule will work for this?" Ken, I want to tell you that I have been in my five (5) years, probably the most balanced Chairman in this County. As I have given everybody an opportunity, not even after one or two times to read, I will allow the reading. We will set the buzzer for three (3) minutes. We will allow the testimony that is going beyond that three (3) minutes a second three (3) minutes, just as I have allowed others. Then, in fact, if we get to the six (6) minute mark and it is not complete, it will be cut-off. I hope I answered your question.

Mr. Taylor:

Thank you.

Chair Furfaro:
first.

Please set the buzzer for three (3) minutes

Ms. Fountain-Tanigawa: This is ES-703 testimony from Lani Kawahara. "Aloha Chair Furfaro and County Councilmembers. As you prepare to go into Executive Session on Tim Bynum vs. County of Kaua'i, et al., I would like to submit for the public record the United States District Court for Hawai'i, Court Order Dismissing with Prejudice Defendant Shaylene Iseri-Carvalho, in her individual capacity. I urge you to read the Order dated February 24, 2014 put forth by J. Michael Seabright, United States District Judge. I hope you will give the Judge's order, rulings and the evidence provided the weight that they should be accorded in your deliberations. Highlights include the following: "Applying these principles, the court finds that Carvalho has utterly failed to establish legal prejudice...." "Further, Carvalho's arguments in opposition of the Motion to Dismiss do not establish legal prejudice." "Finally, Carvalho argues that if the court grants Plaintiff's Motion to Dismiss, the court should make an express finding that Plaintiff's claims were frivolous, such that she is entitled attorneys' fees pursuant to 42 U.S.C. 1988. The court rejects this argument as well." "No has Carvalho established that she entitled to her fees pursuant to 42 U.S.C. 1988, which provides that a prevailing civil rights defendant may recover fees only in exceptional circumstances when the Plaintiff's claims are frivolous, unreasonable, or groundless."

On the assertion that Bynum's claims were frivolous, the court clearly outlines evidence Bynum presented in the case: "Plaintiff presented evidence that (1) Carvalho was openly hostile to Plaintiff, Doc. No. 116-1, Pl.'s Decl. 4; (2) Carvalho investigated an anonymous complaint of a zoning violation on Plaintiff's

property by reviewing a police report concerning Plaintiff's property and contacting the Director of the County Planning Department to determine whether Plaintiff had committed any zoning violations (even though misdemeanors were handled by junior prosecutors), Doc No. 67-2, Carvalho Dcel. 4,6; Doc. No. 116-14, Pl.'s Ex. 12; (3) Carvalho's office filed criminal charges against Plaintiff regarding these zoning violations, even though two of the charges were the result of a possible violation of Plaintiff's Fourth Amendment rights (Miyake informing deputy prosecutor of the manner of her investigation; (4) the criminal charges were dismissed against...

Chair Furfaro:

That was three (3) minutes.

Ms. Fountain-Tanigawa: ...Plaintiff after Carvalho's office was removed from the case for a conflict of interest; and (5) Carvalho sought Plaintiff's recusal from Council matters regarding her office in light of the criminal charges against him, and further released a letter to the media seeking Plaintiff's recusal and outlining several alleged incidents with the Plaintiff." The Court concluded: "Whether or not this evidence establishes Plaintiff's claims (an issue the court need not decide), it shows that Plaintiff had at least some factual basis for his claims, and that they do not appear to be frivolous, unreasonable, or groundless. The court therefore finds that Carvalho would not be entitled to her attorneys' fees even if she prevailed at trial. As a result, proceeding in this action, where Plaintiff has been compensated and seeks dismissal with prejudice, would serve no purpose other than to feed the fire of Plaintiff's and Carvalho's public feud. Needless to say, such purpose does not justify the expenditure of the parties' or the court's resources. The court will not be drawn into this continuing political feud. In conclusion, based on the above, the court dismisses with prejudice Defendant Shaylene Iseri-Carvalho in her individual capacity. The parties shall bear their own fees and costs." Thank you for the opportunity to present this testimony. I ask that the order be entered along with testimony in the public record. Sincerely, Lani Kawahara."

Chair Furfaro: Thank you. Our meeting is called back to order. Mr. Kagawa, you have the floor.

There being no objections, the meeting was called back to order, and proceeded as follows:

Mr. Kagawa: I have a question for Ms. Iseri-Carvalho.

Chair Furfaro: Shay, can you come up please? Before you introduce yourself again, let me suspend the rules for Mr. Kagawa. Mr. Kagawa, you have the floor.

There being no objections, the rules were suspended.

Mr. Kagawa: I just feel that in being fair, that since former Councilmember Kawahara was such a close ally of Mr. Bynum, I feel that it was really an opportunity to present one side of the story in favor of Mr. Bynum. Shay, I am going to ask you, what is your response to this testimony?

Ms. Iseri: There was a motion that was filed by the Plaintiff's attorney— and this is highly unusual. In fact, the Judge had said that it was the first time actually that the case had been disposed of right before the Motions to Dismiss, and then have a Plaintiff come in and file a case to dismiss with prejudice against myself. What the Court found— and it granted that motion. We

were opposed to it because we wanted the public to hear the truth. In this motion, there were no hearings. There was no evidence that was presented, so these were allegations that were made. There was not any evidence where people could be cross-examined in front of a jury. That is what I wanted to make clear, number one. What the Court in the standard of giving the legal fees, they explain what is legal prejudice and the Court did not find "legal" prejudice. It does not mean that it did not find any prejudice; it did not find "legal" prejudice. As explained in the decision, which I have a copy of, a person does not suffer legal prejudice under the Court when a case will be dismissed with prejudice against a Defendant. There are two ways that a case can be dismissed; one is if a case is dismissed without prejudice, then claims can be brought forward. In this matter, initially Bynum had sent over a plea offer for us to dismiss without prejudice, meaning that he could still continue his claims, which is why we contested the matter until finally, they filed a Motion to Dismiss with prejudice, which means that Bynum is prohibited from filing any kind of claims against myself; however, I am not barred from filing any kind of claims against Bynum. I can file a malicious prosecution against Bynum. I can file a defamation suit against Bynum. I am free to file whatever lawsuits I can. I am not barred; the Defendant is barred from bringing up any kinds of claims against myself. In the decision, the Court found that because Bynum is prohibited from filing any kind of additional claims or bringing up any kind of actions involving this matter against me, that there was not this legal prejudice. Had he been able to with a dismissal without prejudice, which is why they changed from a dismissal without to dismissal with... had he been with it, then I would be subjective to legal prejudice, so there is a difference in that. There was also a mention about a conflict of interest involving our office. The conflict arose because my attorney, Jake Delaplane, who was doing the hearing on the Motion to Dismiss became a witness in the case. It had nothing to do with the conflict that involved myself and Mr. Bynum. In the order itself, it clearly says that it was not any kind of conflict that involved my office in seeking any kind of prosecution against Bynum. That needs to be utterly clear. The letter seems to point out certain things. The entire decision is ten (10) pages long, so it is unfortunate— again, because the case arose in Federal Court, the public does not have access to the actual decision because you need to pay for it and be a party to the Public Access to Court Electronic Records (PACER) system. However, the Councilmembers have a copy and Mr. Bynum, I believe, has made it available to the public. Let it be clear that Bynum's case was dismissed with prejudice on his motion against me.

Chair Furfaro:

Does that satisfy your question?

Mr. Kagawa:
Thank you.

That more than satisfies my question.

Chair Furfaro:

Thank you, Shay. Did you have a question?

Ms. Yukimura:

I wanted to have discussion.

Chair Furfaro: Okay. I am going to go to discussion. I will call the meeting back to order. Is there any further discussion?

There being no objections, the meeting was called back to order, and proceeded as follows:

Ms. Yukimura: I just want to reiterate the conclusion of the Court. This is not Ms. Kawahara's opinion; this is the conclusion of the Court. It

shows that the Plaintiff had at least some factual basis for his claim and that those claims do not appear to be frivolous, unreasonable, or groundless. I, too, wish that we could have pushed forward in this case because I believe that there would have been shown and proved some of Mr. Bynum's concerns; however, that would have probably costs both sides of the parties another five hundred thousand dollars (\$500,000). With all of this concern about additional expenses and attorneys' fees, we all have to be concerned about that. Those are the things we had to weigh. I do not think anybody conclude that there would have been no grounds. You also cannot conclude that Mr. Bynum would have prevailed. We do not know the final outcome, but as the Judge has said, it was not, as some people have said, that Mr. Bynum claim's were unreasonable, groundless, or frivolous. The Judge says clearly that is not the case. There were just other considerations about whether they could proceed, one of them being that the insurance company took under the terms of insuring the County and was allowed to make the decision.

Chair Furfaro: I would like to continue to go on to the other Executive Session items. Is there anything that is left to be said with Councilmembers here before we go on to the next item?

Mr. Kagawa: Before this item came up, I individually talked to other Councilmembers and told them that I really want to get past this item because I am tired of it. But it keeps coming up and sometimes I think that we need to serve the public. As I am going out into the community, I have not talked to one person who is happy with how this case has gone and they are not happy that it ended up where it came to a settlement. I understand money caused it to be settled, but the management of the moneys did not allow it to be settled. I think we went in the worst fashion that we could by just hiring three (3) attorneys with no coordination whatsoever. We went in that direction almost forcefully and it disappoints me that the public needs to be so troubled by what transpired in the end because I think what really would be the best outcome is that if some wrongdoing was done, then the Court will decide what went wrong and people can be assured that whoever made wrong decisions be clear, known, and never happen again. With a settlement, it leaves everything open to happen again and to reoccur with no consequences. That is why my frustration is with this case. Moneywise, I am glad it is over. I am ready to turn the page. Like Councilmember Hooser and yourself said, I am ready to move on. We have a lot of big issues in front of us, but it is hard to move on. The public is bewildered about how this case transpired. It is really frustrating. Thank you, Chair.

Chair Furfaro: Understood Mr. Kagawa. Gentlemen, I want to share with you that we have attorneys waiting for us, but I will let you speak. Mr. Rapozo, and then I will go to Mr. Hooser.

Mr. Rapozo: Thank you, Mr. Chair. I really appreciate Councilmember Yukimura saying that she felt all of us wanted to see this thing through, and that is true. We were one (1) day away from first base and it was taken away from us. I think that, like Mr. Kagawa said, as we go in the community, it is very difficult to explain what happened because we do not know what happened. I do not know what happened. A lot of the stuff that we talked about, I cannot discuss here, hoping today we are told that there was a settlement so we can release some of the stuff. I have made a request that we release the Executive Session minutes. That has been made, but I have not heard back yet. I think I read the County Attorney's opinion regarding that, but I am hoping that will be on the agenda soon because I think it is important that the public get to read

what we were told by our attorneys. That is as far as I can go with that. I also prepared a Resolution to pursue a 3.17 Investigation in this matter. That has been submitted for review, which is in process, and the Chair has some valid questions regarding what can and cannot be discussed, what can and cannot be in the Resolution, and I am sure that is being vetted out through OIP as we speak. I am hoping to see that on the agenda shortly. As Councilmember Yukimura talked about wanting to see this go forward—this is one opportunity that we can at least find out what happened. How can a settlement be reached that affects County taxpayers without this body having a say? I am flabbergasted. If that is allowed, then we need to change that; either by Charter Amendment or whatever... I do not know because we do not know. I am hoping to have that discussion today in Executive Session. If the settlement did occur like I just said, it happened without our approval—that I can tell you. I have never seen a case go down this road and I will tell you that as Mr. Kagawa said, the people in the public are asking me, “What happened? Is it because he is a Councilmember? Did he get special treatment?” I cannot answer that until we do a 3.17 Investigation to find out at what point did this County, whether it is through the attorneys or through whomever, transferred the authority from this body to the insurance company? When did that happen and how? Why as the slide showed earlier on the Rules of Professional Conduct where the client is supposed to be kept abreast of every settlement opportunity. We were never. We were told something completely different, but apparently this was going on while we were being told something different. Did we treat this case different because it was involving a Councilmember? We need to find out. This body, for some reason—I happen to be absent that day as well as the Chair, but this body approved Special Counsel moneys with only four (4) votes, which is against the Charter. How did that happen? Were we assured that it was okay? Did the County Attorney not stop us and say, “Hey, you guys need five (5) votes?” How did that happen? That has not been rectified. I have asked that question and the answer that I got from the County Attorney’s Office was, “I need more time.” The fact of the matter is in public record. The Council voted to approve Special Counsel funds with only four (4) votes and it got approved; yet the Rules and the Charter requires five (5). I have not gotten that response and that is not an Executive Session question; that is public session. That is just a rule question. How did that happen? I believe that the only way, as Mr. Kagawa said, turn that page and move on, is by this Council supporting an investigation, a 3.17 Investigation; one that this Council, for some reason, is reluctant to do, but that is our right and our authority under the Charter. I think in this case, it is warranted. Find out exactly where it went wrong, because number one, we cannot afford to have these mistakes occur over and over again. This is more of a plea to the body and the Chair that we get that Resolution on the agenda as soon as possible and have that discussion. My suggestion is that we hire a retired Judge that can do the investigation and come up with recommendations to us on exactly what they found, what went wrong, and how we can prevent this from happening again. Thank you, Mr. Chair.

Chair Furfaro:
have the floor.

Thank you, Mr. Rapozo. Mr. Hooser, you

Mr. Hooser: Thank you, Chair. As much as we all say that we want to move on on this, it seems like we are not able to do so and I certainly would like to move on. I just have a couple of comments. I agree with much of what has been said that we really do not know what the situation is. We do not know whether or not the Planning Department authorized trespassing onto a Councilmember’s property. We do not know if the Prosecutor’s Office acted with political motives against the Councilmember. We do not know a number of things

and the only real way to know ... we can investigate and get some information, but at the end of the day, only the Court system will judge guilt or innocence. For whatever reason with the situation as it is with our insurance, we will settle apparently, without the Court making a final decision, but I believe all sides deserve fair and equal representation and treatment by this Council. I am very disturb and somewhat angry at the public's testimony that disparages liable and slanders individuals, including Councilmember Bynum. What about due process? What about the findings of a Court or the findings of an investigation. We have people coming up here on the mic and go on and on, putting things on the record, slandering people's integrity and character, and I have a problem with that. I do not know we are allowed to address that in Council Rules or not. I think it is important for the record or people to know that Councilmember Bynum is not allowed to be here. He is not allowed to speak on his own behalf during this proceeding, which is why he is not here today. We have a one-sided punching bag that goes on and on every other week. I am thankful that former Councilmember Kawahara submitted her testimony and it was read into the record. It is my understanding that she would have liked to be here, but had staff issues and was not able to be here. I would encourage the community to give a little class and thought into their future testimony and address the issue based on fairness and equity in allowing everybody that due process and fairness when speaking up. Thank you.

Chair Furfaro: Thank you. I do want to address some of the concerns. I want the members to know that I have been in discussion with the Rules Committee about revisiting some of the rules. It is so unfortunate that we have conclusions drawn and information shared that is not factual, name-calling, and insinuations about integrity, trust, and honesty. Quite frankly, we have to review the Rules to get that under control. It is with great concern and the perpetuation of a spirit of cooperation to share good information for the right reasons, for the right people. I think we will be revisiting the rules. I hope I can satisfy you with that. I, myself, find myself now... many times, I have extended myself to meet with people to talk about procedures, site inspections, and so forth. Additional freedoms are taken that are very unfortunate and we will address that at another time. Thank you very much for your comments and I would like to move on to the next Executive Session presentation with the County Attorney up for ES-709.

Mr. Rapozo: Mr. Chair, I know that the first item was read by our Clerk. Is that sufficient? Those things, for some reason, catch my eye and I just do not know... I think it is fine. I think anyone can read it, but as long as we go in with an attorney.

Chair Furfaro: Okay. Jade, why do you not just read it again?

ES-709 Pursuant to Hawai'i Revised Statutes (HRS) Sections 92-4, 92-5(a)(4), and Kaua'i County Charter Section 3.07(E), the Office of the County Attorney requests an Executive Session with the Council to provide the Council with a briefing to discuss the Council's obligations as it relates to Sheilah Miyake's request for payment of attorneys' fees in Tim Bynum vs. County of Kaua'i, et al., Civil No. CV12-00523 RLP (United States District Court), and related matters. This briefing and consultation involves the consideration of the powers, duties, privileges, immunities and/or liabilities of the Council and the County as they relate to this agenda item.

Chair Furfaro:
into Executive Session.

Thank you. I am looking for a motion to go

Mr. Kagawa moved to convene in Executive Session for ES-703 and ES-709, seconded by Ms. Yukimura.

Chair Furfaro: Let us take ES-703 first.

Ms. Fountain-Tanigawa: This is a vote to go into Executive Session on ES-703.

The motion to convene in Executive Session for ES-703 was then put, and carried by the following vote:

FOR EXECUTIVE SESSION:	Chock, Hooser, Kagawa, Rapozo, Yukimura, Furfaro	TOTAL – 6,
AGAINST EXECUTIVE SESSION:	None	TOTAL – 0,
EXCUSED & NOT VOTING:	None	TOTAL – 0,
RECUSED & NOT VOTING:	Bynum	TOTAL – 1.

Chair Furfaro: Okay. Let us go to ES-709.

The motion to reconvene in Executive Session for ES-709 was then put, and carried by the following vote:

FOR EXECUTIVE SESSION:	Chock, Hooser, Kagawa, Rapozo, Yukimura, Furfaro	TOTAL – 6,
AGAINST EXECUTIVE SESSION:	None	TOTAL – 0,
EXCUSED & NOT VOTING:	None	TOTAL – 0,
RECUSED & NOT VOTING:	Bynum	TOTAL – 1.

Ms. Fountain-Tanigawa: Chair, did you want to dispose of ES-711?

Chair Furfaro: Yes. Let us dispose of ES-711.

ES-711 Pursuant to Hawai'i Revised Statutes (HRS) Sections 92-4, 92-5(a)(4), and Kaua'i County Charter Section 3.07(E), the purpose of this Executive Session is to provide the Council with a briefing in Lynell Tokuda, et al. vs. Chris Calio, et al., Civil No. CV13-00202 DKW-BMK (U.S. District Court), and related matters. This briefing and consultation involves the consideration of the powers, duties, privileges, immunities and/or liabilities of the Council and the County as they relate to this agenda item.

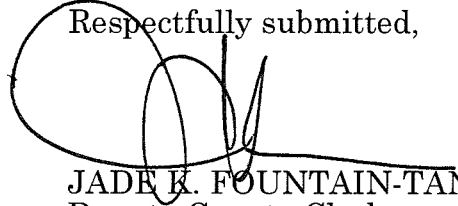
Mr. Rapozo moved to receive ES-711 for the record, seconded by Ms. Yukimura, and carried by a vote of 6:0:1 (*Mr. Bynum was noted as excused*).

Chair Furfaro: We will be going into Executive Session for approximately an hour.

ADJOURNMENT.

There being no further business, the Special Council Meeting adjourned at 11:01 a.m.

Respectfully submitted,

A handwritten signature in black ink, consisting of a large, stylized 'J' followed by a series of loops and a long horizontal stroke extending to the right.

JADE K. FOUNTAIN-TANIGAWA
Deputy County Clerk

:cy